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July 18, 2017

BY COURIER
Tracy A. Uhrin, Clerk
Merrimack Superior Court
P.O. Box 2880
163 North Main Street
Concord, NH 03302-2880

RE: *Georgia A. Tuttle, M.D., LRGHealthcare, and Derry Medical Center v. New Hampshire Medical Malpractice Joint Underwriting Association*
Merrimack County Docket No. 217-2010-CV-00414
In the Matter of The Winding Down of the New Hampshire MedicalMalpractice Joint Underwriting Association - Merrimack County Docket No. 217-2015-CV- 00347

Dear Clerk Uhrin:

In follow-up to our conference with the Court this past Friday, July 14, enclosed for filing with the Court in the matters referenced above, please find for the Court's approval a revised *Rule 9 Interlocutory Appeal without Ruling ordered by the Merrimack County Superior Court (McNamara, J.)* reflecting suggestions the Court and counsel discussed. I've included three Chambers copies and one additional copy marked to show the changes from the initial filing. The related Appendix is already on file.

We're available at the Court's convenience if there are questions or concerns. The Court has indicated, subject to its review of this filing, it will approve the interlocutory transfer. Accordingly, I would be grateful if you would advise me as soon as the order is entered.

Thank you.

Sincerely,

Kevin M. Fitzgerald

Enclosures
cc: J. David Leslie, Esq.
W. Scott O'Connell, Esq.
Eric A. Smith, Esq.

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. _____

Georgia A. Tuttle, M.D., LRGHealthcare, and Derry Medical Center

v.

New Hampshire Medical Malpractice Joint Underwriting Association

(Merrimack County Docket No. 217-2010-CV-00414)

In the Matter of The Winding Down of the New Hampshire Medical Malpractice Joint Underwriting Association

(Merrimack County Docket No. 217-2015-CV- 00347)

Rule 9 Interlocutory Appeal Without Ruling
Ordered by the Merrimack County Superior Court (McNamara, J.)

Respectfully submitted,

Georgia Tuttle, LRGHealthcare, and Derry Medical Center individually and on behalf of all similarly situated individuals or entities

By Their Attorneys,
NIXON PEABODY LLP

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

STATE CASES

STATE STATUTES

COURT RULES

OTHER AUTHORITIES

ADDENDUM

RULE 9 INTERLOCUTORY APPEAL WITHOUT RULING

(a) Parties and Counsel of Record in the Two Interrelated Proceedings

(1) *Tuttle v. NHMMJUA*

Georgia Tuttle, LRGHealthcare, and Derry Medical Center, individually and on behalf of all similarly situated individuals or entities	New Hampshire Medical Malpractice Joint Underwriting Association,
Plaintiff/Putative Class Counsel	Defendant NHMMJUA Counsel
Kevin M. Fitzgerald (NH Bar No. 806) kfitzgerald@nixonpeabody.com W. Scott O'Connell (NH Bar No. 9070) soconnell@nixonpeabody.com Nixon Peabody LLP 900 Elm Street, 14th Floor Manchester, NH 03101	Daniel J. Mullen dmullen@ranspell.com Ransmeier & Spellman 1 Capitol Street P.O. Box 600 Concord, NH 03301

(2) *In re Winding up of the NHMMJUA*

Roger Sevigny, Insurance Commissioner of the State of New Hampshire, as Receiver of the New Hampshire Medical Malpractice Joint Underwriting Association	Georgia Tuttle, LRGHealthcare, and Derry Medical Center, individually and on behalf of all similarly situated individuals or entities
Plaintiff/Receiver's Counsel	Intervenors/Putative Class Counsel
J. David Leslie dleslie@rackemann.com Eric A. Smith esmith@rackemann.com Rackemann Sawyer & Brewster PC 160 Federal Street Boston, MA 02110-1700	Kevin M. Fitzgerald (NH Bar No. 806) kfitzgerald@nixonpeabody.com W. Scott O'Connell (NH Bar No. 9070) soconnell@nixonpeabody.com Nixon Peabody LLP 900 Elm Street, 14th Floor Manchester, NH 03101
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(b) Statement of the Facts

This Rule 9 Interlocutory Appeal Without Ruling arises from orders in two interrelated cases connected to the receivership and dissolution of the New Hampshire Medical Malpractice Joint Underwriting Association ("NHMMJUA")[1] and the resulting requirement to make a final liquidating distribution of excess funds remaining in the NHMMJUA to the more than 6,200 policyholders who own them.[2] Both of these actions are pending before the Merrimack County Superior Court (McNamara, J.) and are authorized by RSA 404-C:15, 16 and 17.

RSA 404-C:15, I states:

> Upon the effective date of this section, the insurance commissioner shall bring a petition to the superior court for Merrimack county for the receivership of the New Hampshire medical malpractice joint underwriting association (NHMMJUA) pursuant to RSA 402-C....

RSA 404-C:16, I states:

> The insurance commissioner, as receiver of the NHMMJUA, shall, consistent with this section, RSA 404-C:14, RSA 404-C:15, RSA 404-C:17, and the provisions of RSA 402-C wind-down its business, seeking to facilitate the payment of all policyholder coverage obligations in full and in the normal course of business. The receiver shall make monthly reports to the court detailing progress made in the wind-down of the NHMMJUA, including expenses incurred. Interested persons, including policyholders, shall have standing in the receivership and the right to be heard in reference to the monthly reports.

RSA 404-C:17, III states:

> Prior to the receiver's discharge in accordance with paragraph II, all assets remaining after court approval of the receiver's transfer of all of the NHMMJUA coverage-related obligations, payment of the NHMMJUA's administrative and operational expenses, transfer

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1 *In the Matter of The Winding Down of the New Hampshire Medical Malpractice Joint Underwriting Association*, Docket No. 217-2015-CV- 00347, Merrimack County Superior Court (the "Receivership Action").

2 *Georgia A. Tuttle, M.D., LRGHealthcare, and Derry Medical Center v. New Hampshire Medical Malpractice Joint Underwriting Association*, Docket No. 217-2010-CV-00414, Merrimack County Superior Court ("Tuttle II" or the "Policyholder Class Action").

> or resolution of tax obligations, and payment of receivership expenses, **shall be interpleaded by the receiver into the Merrimack county superior court, docket no. 217-2010-CV-00414, for the purposes of adjudicating all policyholder claims in those funds.** The interpleader into docket no. 217-2010-CV-00414 shall not prejudice the rights of any class of NHMMJUA policyholders with respect to those funds. If any class of NHMMJUA policyholders cannot be represented or is barred from the old action, a new interpleader action shall be commenced to allow such policyholders to assert their claims with respect to the funds. Neither the state of New Hampshire nor any agency thereof shall have any claim to these funds.[3] (emphasis added).

In furtherance of these statutory mandates, on July 21, 2015, New Hampshire Insurance Commissioner Roger Sevigny as court-appointed NHMMJUA Receiver ("Receiver") initiated the Receivership Action through a Verified Petition. On July 22, 2015, the Court issued an Order of Rehabilitation, which has since guided the actions of the Receiver. App. 1, 35, 58. Each month thereafter, the Receiver has provided a Status Report to the superior court for consideration and approval. App. 313 (the May 2017 Monthly Report). Since then, the Receiver—with Court oversight and approval—stopped issuing new NHMMJUA policies, has successfully placed all of NHMMJUA's contractual insurance obligations with another commercial insurer pursuant to an Assumption Agreement, filed the final tax returns for the entity and paid all taxes due, and is monitoring whether any final obligations will be owed under the limited warranties and covenants of the Assumption Agreement which expire in approximately two (2) months in August 2017. Accordingly, the receivership is substantially

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[3] Predecessor statute RSA 404-C:14 (Repealed), is identical on the interpleader requirement. It stated:

> All such excess surplus funds have resulted from premiums paid under assessable and participating medical malpractice insurance policies, belong to the policyholders who paid these premiums, and shall be returned as directed under this section. Within 60 days from the effective date of this section, all excess surplus funds, except for a reserve of $25,000,000 for the payment of any federal tax liability, **shall be interpleaded into the Merrimack County Superior Court, docket no. 217-2010-CV-00414 for the purpose of adjudicating all policyholders' claims to excess surplus funds** (emphasis added). App. 211.

complete except for these expiring contractual contingencies and the closure of the examination periods for its completed tax returns.

The NHMMJUA currently has approximately of $88,484,870 in funds remaining. App. 321. Because this amount is substantially more than any reasonably anticipated remaining NHMMJUA obligations, the Receiver proposed to the Court to make an initial, partial distribution of $50,000,000 for return to policyholders through the Policyholder Class Action, with the balance to follow in subsequent transfers. Accordingly, on February 17, 2017, the Receiver filed a Motion for Approval of Interim Distribution, Interpleader and Related Discharge Pursuant to RSA 404-C:17. App. 1. On February 22, 2017, the Lead Policyholders in *Tuttle II* filed an Assent to and Joinder in the Motion for Interim Distribution. App. 15. On March 31, 2017, the Court held a consolidated hearing in the Receivership and Policyholder Class Action where this assented-to Motion was heard (the "Consolidated Hearing").

Contemporaneous with the Motion for Interim Distribution in the Receivership, the Lead Policyholders in *Tuttle II* filed a Renewed Motion for Preliminary Class Certification with supporting affidavits and materials in the Policyholder Class Action. App. 28. The Lead Policyholders sought (1) preliminary certification of the class for purposes of the anticipated interim and final distributions from the Receivership; (2) the appointment of lead counsel (who handled the prior class proceedings which returned $110 million to policyholders); (3) authority to hire a claims administrator; (4) authority to provide notice of the new distribution to each member of the class; (5) authority to provide a Plan of Allocation to the class which—like *Tuttle II*—would propose return of funds on a pro rata basis based on premiums paid; (6) a schedule under which class members so inclined may object to the plan of allocation; and (7) the process for presenting arguments and any objections at a hearing on the plan of allocation. Oral

argument on this motion was also heard during the March 31, 2017 Consolidated Hearing. During argument, the Court authorized further briefing on the "method of distribution as no statute or rule governs interpleader in New Hampshire." Exhibit 1. The further briefing was filed on April 19, 2017. App. 95.

On May 2, 2017, the trial court (McNamara, J.), denied the unopposed Renewed Motion for Preliminary Class Certification without prejudice to renew. Exhibit 2. In doing so, the Court observed that proceeding as a class action was optimal but directed the Lead Policyholders to prepare a Rule 9 Interlocutory Transfer Without Ruling to the Supreme Court seeking confirmation that New Hampshire law and the court's rules, *inter alia*, Superior Court Rule 16, provide it with authority to proceed as a limited fund class action similar to the procedure contained in Fed. R. Civ. P. 23(b)(1)(B).

On May 12, 2017, the Lead Policyholders filed a Motion for Reconsideration. App. 122. The Lead Policyholders argued it was a reasonable exercise of the Court's discretion to proceed because: (1) the extraordinarily successful return of 98.53% of the funds originally distributed in *Tuttle II*—without objection from any of the 6,200 class members— provides ample, specific authority for proceeding similarly in this substantially similar action; (2) RSA 404-C:17 is modeled on predecessor statute 404-C:14 that provided for exactly the same procedure; (3) Super. Ct. R. 16(h) expressly permits the trial court to order the payment of damages into the court and then to distribute them in any way it deems appropriate; (4) the New Hampshire Supreme Court has instructed that Fed. R. Civ. P. 23 is guidance in state court class actions, *In re Bayview Crematory LLC*, 155 N.H. 71 (2007); (5) the trial court's equitable powers provide it with broad authority to carry out the requirements of RSA 404-C:17; and (6) the interlocutory transfer arguably an seeks advisory opinion without actual controversy where no party in the

pending case questions the Court's ability to proceed. App. 123-133. The Lead Policyholders argued that because none of the 6,200 class members (or any other party) objected to the substantially identical process last time, there is no basis in the record to presume the same approach will bring objections this time.

On May 17, 2017, the trial court denied the unopposed motion for reconsideration without addressing that there were no objections to the prior (or proposed) distribution, or whether the transferred questions proposed sought advisory opinions on a matter where there is no controversy or jurisdictional question advanced by any party. Exhibit 3.[4] Accordingly, this Rule 9 Interlocutory Transfer Without Ruling is submitted on the following two questions:

(c) Questions Transferred

(1) Whether, in the circumstances of this case, it is a sustainable exercise of the Court's discretion to adjudicate the Policyholders' claims as a limited fund class action against the funds the [Receiver] seeks to tender to the Court in accordance with RSA 404-C:17, III, in a manner akin to Fed. R. Civ. P. 23(b)(1)(B), whether at law, in equity, and/or pursuant to Superior Court Rule 16; and

(2) If yes, whether the court may proceed in substantially the same manner it did in the prior Policyholder Class Action; alternatively, what procedure should be utilized by the Court to ensure fair adjudication of the claims of identified claimants.

(d) Basis of Appeal

The trial court summarized its reasons for ordering this interlocutory transfer as follows:

> In the circumstances of this case, where the need for a remedy is apparent, the procedure to be applied unclear, and the amount of money at stake, $86 million, is significant, the Court believes that the New Hampshire Supreme Court should determine what procedure should be applied to adjudicate the competing claims of the policyholders in this matter. Exhibit 2 at 16.

The court further stated:

[4]At a further conference on July 14, 2017, the Court indicated it could adjudicate this case as a class in a manner analogous to Fed. R. Civ. P. 23 (b)(1)(B) if its discretion to do so were affirmed by either Rule 9 interlocutory guidance or a clarifying amendment of Superior Court Rule 16.

> Treating all plaintiffs as members of a class is logical and reasonable. There is a limited fund of money available to former policyholders of the JUA and there are more than six thousand claimants. Those claims are essentially contractual in nature and should be subject to adjudication to fixed and definite metrics. *Id.* at 12.
>
> Courts have been willing to take jurisdiction over funds such as trust assets, bank accounts, insurance proceeds, and company assets in a liquidation sale in order to ensure that claims are distributed in a proportional way to each class member's percentage of substantiating claims (internal citations omitted). *Id.* at 13-14.

The trial court's question arises because Superior Court Rule 16 (formerly Rule 27) does not specifically speak to the circumstance of so-called "limited fund" recoveries which in the Federal Rules of Civil Procedure are separately addressed as a mandatory class with no right to opt out under Fed. R. Civ. P. 23(b)(1)(B). The federal rule and related common law recognize that by their nature limited funds such as the NHMMJUA's final, liquidating distribution after which no assets will remain can create a "race to the courthouse" by those opting out in favor of seeking individual recoveries that may unfairly deplete or exhaust funds available for the class. In such circumstances, in order to protect the class against individual actions, class participation is mandatory with no right to opt out, allowing the court to then fairly and concurrently adjudicate the rights of the entire class to the limited fund. *Id.* Rule 16 does not speak directly to the subject of the superior court preventing opt-outs in a limited fund case such as that resulting here from the complete liquidation of the NHMMJUA. Plainly though, the remaining excess funds will be finite as the NHMMJUA ceases to exist, making separate recourse for opt-out parties problematic. The trial court acknowledges competing claims threatening equitable class recovery are possible unless opt outs are not permitted and the case is administered as a mandatory class; it asks for confirmation it may do so. Exhibit 2 at 15 ("However, the Court cannot be guided by a Rule which was never enacted by the New Hampshire Supreme Court as

part of the Superior Court Rules. This is particularly so with respect to any proposed limited fund settlement, which in order to effect its purposes, must be a mandatory settlement and thereby cuts off substantive rights"). *Id.* at 16.

Lead Policyholders have complied with this request but respectfully disagreed in light of *In re Bayview Crematory LLC*, *supra*, and the analogous direction of Superior Court Rule 16(h), there is doubt about the trial court's ability to proceed to adjudicate the case as it did in *Tuttle II*. The legislature, in an undertaking no one contests, directed excess NHMMJUA funds be paid into Court via the *Tuttle II* docket for the court to then adjudicate all policyholder claims. In the original Tuttle II proceeding in which Policyholders submit the same trial court did substantially the same thing, the questions now posed by the court were not raised, and none of the 6,200 class members (substantially the same class in the pending case) objected to the pro rata distribution contained in the Plan of Allocation. Consistent with the original distribution, and as now expressly contemplated in RSA 404-C:15-17, putative undersigned Class Counsel proposed handling this distribution upon liquidation in the same way: (1) conditionally certify the class; (2) provide notice to all class members; (3) provide a Plan of Allocation that provides for the pro rata distribution based on premiums paid by each class member; (4) establish a deadline for any class member to object to the pro rata distribution, and offer an alternative plan; and (5) establish a date for hearing any objections and otherwise consider the Plan of Allocation. Employing this proven procedure, the trial court can decide the issues and any aggrieved party may object, be heard and have a right of appeal.

In support, the Lead Policyholders offer four principal reasons. First, RSA 404-C:17 is identical to predecessor statute 404-C:14 (repealed) with regard to the interpleading of funds in

the *Tuttle II* docket for class adjudication of claims and return funds to policyholders.[5] The Lead Policyholders have sought that the same process be followed here; i.e., the trial court take custody of the funds through interpleader (or any other mechanism the trial court orders) and proceed through a class action to adjudicate policyholder shares in these funds.

Second, the process followed under the predecessor statute, RSA 404-C:14 (repealed) was extraordinarily successful and achieved among the highest rates of return—98.5% — of any class action in United States history. App. 32, 89, 96, 123, 125. This was notable given the class period extended over 26 years. The legislature had the benefit of this history when it enacted successor statute RSA 404-C:15 to 17 and sought to have the same process followed.

Third, Superior Court Rule 16(h) provides express authority necessary for the trial court to fashion a pro rata class distribution to policyholders as contract damages under their respective insurance policies just as the court did in *Tuttle II*. That rule states:

> **Methods of Payment of Damages.** If the court renders judgment in favor of a plaintiff class, the court may, in its discretion, order the defendant to pay damages into the court and require each member of the class to file a claim with the court, or order payment of damages in any other manner it deems appropriate.

Id. This rule, while not using the term interpleader, describes its substantial equivalent and is sufficient authority to resolve this case. The New Hampshire Supreme Court has held the policyholder class has a vested right to these funds and in *Tuttle II* the trial court entered declaratory judgment that the class was contractually entitled to their return. App. 100-101 & n.3; App. 106-108; *Tuttle I* and *Tuttle II*. Payment into court of the remaining funds subject to

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[5] The trial court correctly observes that an interpleader with all the same features of Fed. R. Civ. P. 22, so-called "Rule Interpleader," was not followed in *Tuttle II*. Exhibit 2 at 11-12. But Lead Plaintiffs suggest the trial court's recollection an interpleader did not occur is incorrect as established by its own orders reciting as much. *See* Exhibit 2 at 10; Exhibit 3 at 2; App. 127. Indeed, a Joint Bill of Interpleader was filed by the NHMMJUA and the Lead Policyholders. Exhibit 2 at 11; App. 1-14, 15-27, 95-121. This provided the trial court with authority over the funds. The matter then immediately proceeded as a class action which it administered as a limited fund recovery.

their vested rights is, therefore, appropriate so the trial court may order their allocation in a manner it deems reasonable and just. The rule gives the trial court substantial berth to "order payment of damages in any other manner it deems appropriate." Super. Ct. R. 16(h); *see also* App. 127-128.

Last and significantly, the trial court acknowledges the New Hampshire Supreme Court's direction that in the administration of state court class actions, it should be informed by Fed. R. Civ. P. 23. *In re Bayview Crematory LLC*, 155 N.H. 71 (2007). App. 130-131. Fed. R. Civ. P. 23(b)(1)(B)—which existed at the time of *Bayview Crematory*—directly informs on how the Court may fairly adjudicate this case. *Id.* When there is a limited fund, limiting opt-outs in the manner of Fed. R. Civ. P. 23(b)(1)(B) to ensure a fair distribution to the entire class is a reasonable solution and a sustainable exercise of the Court's discretion. The lack of analogous detail in the New Hampshire rule does not impeach this concept. The combination of Sup. Ct. R. 16(h), the instruction of Fed. R. Civ. P. 23(b)(1)(B) and the trial court's broad equitable powers provide ample authority.

WHEREFORE, the Lead Policyholders, as ordered by the Superior Court, tender the two transferred questions for consideration pursuant to New Hampshire Supreme Court Rule 9. The Lead Policyholders respectfully request that the Supreme Court:

A. Enter an order accepting the transferred questions for further briefing as the Court may require, or alternatively;

B. Summarily enter an order answering each of the two questions transferred in the affirmative; and

C. Allow such other and further relief that justice may require.

Authorization to submit this Rule 9
Interlocutory Appeal Without Ruling

_____

Richard B. McNamara,
Presiding Justice

Respectfully submitted,

Georgia Tuttle, LRGHealthcare, and Derry Medical Center, individually and on behalf of all similarly situated individuals or entities

By Their Attorneys,
NIXON PEABODY LLP

Dated: July 18, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2017, a duplicate of LEAD POLICYHOLDERS' RULE 9 INTERLOCUTORY APPEAL WITHOUT RULING was mailed by first class mail to parties of record.

Kevin M. Fitzgerald, Esq.

EXHIBIT 1

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
163 North Main St/PO Box 2880
Concord NH 03302-2880

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NOTICE OF DECISION

FILE COPY

Case Name: **In the Matter of the Winding Down of: The New Hampshire Medical Malpractice Joint Underwriting Association**
Case Number: **217-2015-CV-00347**

Please be advised that on April 03, 2017 Judge McNamara made the following order relative to:

Bill of Interpleader Pursuant to RSA 404-C:17

"Action on the proposed Bill of Interpleader is deferred pending briefing on the method of distribution, as no statute or rule governs interpleader in New Hampshire."

April 04, 2017

Tracy A. Uhrin
Clerk of Court

(485)

C: J. Christopher Marshall, ESQ; Daniel John Mullen, ESQ; W. Scott J. O'Connell, ESQ; Gordon J. MacDonald, ESQ; Kevin M. Fitzgerald, ESQ; Eric A. Smith, ESQ; J. David Leslie, ESQ

NHJB-2581-S (07/01/2011)

EXHIBIT 2

The State of New Hampshire

MERRIMACK, SS SUPERIOR COURT

Georgia A. Tuttle, M.D., LRG Healthcare and Derry Medical Center

v.

New Hampshire Medical Malpractice Joint Underwriting Association
No. 2010-CV-00414; 00294[1]

And

In the Matter of the Winding Down of the New Hampshire Medical Malpractice Joint Underwriting Association

No. 2015-347

ORDER

This case involves claims of policyholders of the New Hampshire Medical Malpractice Joint Underwriting Association ("JUA") who seek to recover excess proceeds from the JUA's operation. Pursuant to RSA 404-C: 17, the Receiver of the Association, Insurance Commissioner Roger A. Sevigny, ("Receiver") has filed a pleading he captions "Receiver's Motion for Approval of Interim Distribution, Interpleader and Related Discharge Pursuant to RSA 404-C:17," reciting that he believes sufficient funds exist to

[1] Plaintiffs have filed a number of pleadings in Tuttle et al v. New Hampshire Medical Malpractice Underwriting Association, no.2010-CV-294 and 0414 which should properly have been filed in In re Funds of the New Hampshire Medical Malpractice Joint Underwriting Association, No.2015-CV-520: but Plaintiffs have taken a voluntary non-suit with prejudice in that case. To add to the confusion, the Insurance Commissioner, through the Receiver, has filed a pleading he calls a "Motion for Approval of Interim Distribution, Interpleader and Related Discharge pursuant to RSA 404-C:17, III in In the Matter of the Winding Down of the New Hampshire Medical Malpractice Joint Underwriting Association, No. 2015-CV-000347. The Court deals with the merits, which can be addressed in the context of all cases.

make a distribution of $50 million[2] in excess proceeds to policyholders. The Receiver believes that it is necessary to maintain a reserve of $36 million in assets to address remaining costs and obligations of the JUA in receivership including administrative and operational expenses of the JUA, the expenses of the receivership, the tax obligations of the JUA and to provide a reasonable reserve for unknown and unexpected obligations of the JUA.

Georgia A. Tuttle, M.D., LRG Healthcare and Derry Medical Center ("Plaintiffs"), purporting to act as representatives of all other policyholders have filed a Renewed Motion for Preliminary Class Certification, Appointment of Class Counsel, and Approval of Notice. Plaintiffs argue that this action should proceed as a limited fund class action in accordance with the provisions of Fed. R. Civ. P. 23(b)(1)(B). However, Superior Court Rule 16, which governs class actions, contains no analogous provision, and for the reasons stated in this Order, the Court does not believe that it has authority to treat the Plaintiffs' claims against the res as a class action against a limited fund without guidance from the New Hampshire Supreme Court. Accordingly, the Renewed Motion for Preliminary Class Certification, Appointment of Class Counsel and Approval of Notice is DENIED WITHOUT PREJUDICE. Counsel for the Plaintiffs shall prepare an Interlocutory Transfer Without Ruling pursuant to New Hampshire Supreme Court Rule 9 containing at least the question of whether: (1) in the circumstances of this case, the Plaintiffs may bring a class action against the funds held by the Insurance Commissioner accordance with RSA 404-C: 17, pursuant to Superior Court Rule 16 and (2) if such an action may be maintained, what procedures should be utilized by this Court to ensure fair adjudication

[2] No funds have actually been deposited with the Court, but the Insurance Commissioner has indicated

of the competing claims. Since appellate review is necessary, the Court briefly sets forth the background of this case.

I

A. Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Ass'n, 159 N.H. 627 (2010) ("Tuttle I")

This case arose from litigation between the parties described in Tuttle et al v. New Hampshire Medical Malpractice Joint Underwriting Ass'n, 159 N.H. 627 (2010) ("Tuttle I"). The Joint Underwriter's Association ("JUA") administers a mandatory risk sharing plan authorized by RSA 404-C. The plan provides access to medical professional liability insurance coverage to medical providers in the State of New Hampshire. The JUA is governed by a Board of Directors, which is vested with authority over the operation of the plan, subject to the oversight of the Insurance Commissioner. The JUA owes contractual and regulatory duties to its policyholders. The rights and obligations between the JUA and the policyholders are set forth in the insurance agreement. The Insurance Department rules govern application of the excess surplus from premiums remaining after claims and expenses. N.H. Admin. Rules, Ins. 1703.07(d). Pursuant to these regulations, any excess surplus may be applied to reduce future assessments of the Association or may be distributed to policyholders. Id.

In 2009, the Insurance Commissioner issued an analysis determining that $55,000,000 would fulfill the JUA's capital needs. The Legislature then passed Laws 2009, 144:1, which Plaintiffs challenged as unconstitutional. The law required the JUA to transfer a total of $110,000,000 to the State's general fund during fiscal years 2009,

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that he is prepared to tender the funds in accordance with the statutory provisions.

2010, and 2011. Plaintiffs sued, the trial court found in favor of Plaintiffs, and on appeal to the Supreme Court, the Court held that the language of the policies and the regulations, taken together, vests the policyholders with contractual rights in the treatment of any surplus for their benefit. Tuttle I, 159 N.H. at 633, 643–44, 650–52.

B. Tuttle, et al v. New Hampshire Medical Malpractice Joint Underwriting Association, No. 2010-CV-294 ("Tuttle II")

In July 2010, Plaintiffs brought a lawsuit to compel disbursement of the excess surplus. Tuttle, et al v. New Hampshire Medical Malpractice Joint Underwriting Association, No. 2010-CV-294 ("Tuttle II"). In June 2011, the Legislature enacted RSA 404-C:14, II which required the JUA to conduct an evaluation to determine what funds it held that were "excess surplus funds:"

> All such excess surplus funds have resulted from premiums paid under assessable and participating medical malpractice insurance policies, belong to the policyholders who paid these premiums, and shall be returned as directed under this section. Within 60 days from the effective date of this section, all excess surplus funds . . . shall be interpleaded into the Merrimack County Superior Court, docket no. 217-2010-CV-00414 for the purpose of adjudicating all policyholders' claims to excess surplus funds.

RSA 404-C:14, II. In addition, RSA 404-C:14, VI removes all participation from the Insurance Commissioner: "[t]he approval of the commissioner of insurance shall not be required for any action contemplated under this section." Pursuant to the law, the JUA recognized an obligation to pay $85,000,000 to the policyholders and segregated the remaining $25,000,000 for payment of possible federal tax obligations.

No funds were interpleaded by the Insurance Commissioner, the other requisites of an interpleader action had not been complied with, and the Court recognized that an

adverse legal claim was necessary for it to have authority to act. The case was certified for class treatment only on a contract claim against the JUA. Plaintiffs alleged that all parties had the same—or substantially identical—insurance contracts with the same provisions, which remained unchanged in all material respects during the class period. Thus, the Court found that the proposed class appeared to meet the requirements of numerosity, commonality, typicality, adequacy, and predominance, and the Court preliminarily approved the Class on February 7, 2012 and ordered that notice be sent to the putative Class Members. Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 40 (1st Cir. 2003) (affirming predominance where one claim alleged breach of contract); Oscar v. BMW of North Am., LLC, 274 F.R.D. 498, 506–07 (S.D.N.Y. 2011) (finding commonality fulfilled where one claim alleged breach of contract).

In August 2011, Plaintiffs filed a motion for certification of a settlement class. However, at a hearing on preliminary approval, the parties advised the Court that no settlement existed and asked the Court to certify the Class as a liability class. The Court denied the Motion without prejudice, and Plaintiffs filed a Supplemental Motion. The Supplemental Motion sought to certify a class consisting of all JUA policyholders who purchased assessable and participating insurance contracts, issued on or after January 1, 1986 through the date of the final fairness hearing ("class period"). The Class Members would be the named insureds who purchased a policy, as reflected in the JUA books and records.

At oral argument on final certification the parties asked the Court to construe their cause of action as a contractual-right theory, without a breach. The JUA continued to deny any wrongdoing, but it did not dispute the Class's contractual rights. Despite

this modified theory of recovery, Plaintiffs fulfilled their burden of proving that the Class Members shared a question of law in common. This Court granted final certification on June 15, 2012.

Prior to certification, Class Counsel had moved for summary judgment on the contractual right theory on May 1, 2012. On June 1, 2012, the JUA responded and this Court granted the Motion for Summary Judgment on June 27, 2012. Since liability had been established by grant of summary judgment, the only issue remaining was the appropriate distribution of the common fund. Superior Court Rule 16 (h) specifically provides, "[I]f the court renders judgment in favor of a plaintiff class, the court may, in its discretion, order the defendant to pay damages . . . in any manner it deems appropriate."

Plaintiffs proposed a Plan of Allocation dated March 13, 2012 (the "Plan of Allocation"), which provided, in substance, that each class member will receive a percentage distribution equal to their respective percentage of the total premiums paid since 1986. Because the only distinguishing factor among Class Members is the amount of premium each class member paid, the proposed Plan of Allocation uses premium data to divide the common fund on a member-by-member basis. Relying on the JUA's premium records, the Claims Administrator was to calculate each class member's percent of total premiums paid from January 1, 1986. That percentage will be used, after deducting approved contributions awards, fees, and expenses, to determine each class member's share of the common fund. The Plan of Allocation returns between 37 and 40 percent of an individual member's premiums paid, but it does not attempt to consider the time value of premiums paid because this calculation could have federal tax

implications that would decimate the entire common fund for all Class Members. In this way, the Plan of Allocation avoids retroactive tax assessments.

The Court found that the Plan of Allocation provided a fair, reasonable and equitable basis to calculate distributions. The Court's finding was further confirmed by the absence of any substantive objections. The Plan of Allocation was adopted as the Order of this Court for the administration of the "Distribution Fund" and distribution took place in accordance with this Court's order of October 9, 2012. The Court's order provided that $85 million should be distributed immediately and that $25 million should be held as a Federal Tax Reserve. The Court's Order of October 9, 2012 provided that class counsel and counsel for the JUA shall notify the Court when the IRS matter reached resolution and upon such notification the JUA was required to tender the balance of the Federal Tax Reserve to the Claims Administrator. On June 10, 2013 counsel notified the Court that the Internal Revenue Service and the JUA concluded a closing agreement satisfying the Court's condition for release and transfer to the claims administrator of the entire federal tax reserve, and the funds were tendered to the Claims Administrator by the receiver on or about June 10, 2013 for distribution to the class.

C. The September, 2015 Motion to Bring Forward

In September, 2015 counsel for the Tuttle II class, Nixon Peabody LLP, filed a Motion seeking that Tuttle II be reopened for consolidation with a simultaneously filed matter, this case, In re Interpleaded Funds of the New Hampshire Medical Malpractice Joint Underwriting Association, 2015-cv-520. The Plaintiffs brought a proposed declaratory judgment action seeking a declaration that the Court accept jurisdiction and

control over funds to be transferred to the Court and approve a plan of allocation to return the funds transferred pursuant to RSA 404-C: 17 to the class and to each subclass.

By Order dated January 12, 2016, the Motion to Bring Forward, Reopen and Consolidate was DENIED WITHOUT PREJUDICE. The Court reasoned that the class period in the proposed declaratory judgment action runs from January 1, 1986 to the termination of the receivership, which was different from the class period in Tuttle, 2010-CV-254, which ran from January 1, 1986 through the date of the fairness hearing. Moreover, the parties were not identical. (Order, Jan. 12, 2016.)

Plaintiffs recognized this issue, and moved to reconsider, asserting that the Court had misapprehended whether the class representatives could act as members of subclasses. Plaintiffs also responded to the Court's statement that there is no authority for the proposition that a class action may be brought against property by referencing Fed. R. Civ. Proc. 23(b)(1)(B). (Order, Jan. 12, 2016.)

The Court denied the Motion to Reconsider on February 24, 2016, finding that the action could not procced because there was nothing for the Court to adjudicate. The action purported to be an action *in rem*, brought against funds *to be* interpleaded into the Court. Since at the time of the filing, no funds had actually been interpleaded into the Court, no claimant had been served, and the Insurance Commissioner was not a party defendant, the Court had no jurisdiction to make orders which would bind the Commissioner, the Receiver or control the funds and the Motion and a Motion to Reconsider were denied without prejudice. (Order, Feb. 24, 2016, p. 2.) No appeal was taken.

II

On March 15, 2017, Plaintiffs filed a pleading they captioned as "Lead Plaintiffs Renewed Motion for Preliminary Class Certification, Appointment of Class Counsel and Approval of Notice" ("Renewed Motion"). The Motion recited that on February 17, 2017 the JUA's Receiver sought to make a partial initial interpleader of $50 million into the Tuttle II docket. In that case, the Plaintiffs alleged that the Insurance Commissioner believed that $36 million was sufficient to address remaining costs and obligations of the JUA receivership, including administrative and operational expenses of the JUA, the expenses of the receivership, the tax obligation of the JUA and to provide a reasonable reserve for unknown and unexpected obligations. As Exhibit A to the Motion, Plaintiffs filed a proposed declaratory judgment, seeking the following relief:

> 32. Plaintiffs seek a declaration from this Court that they are, by virtue of their "Assessable and Participating" insurance contracts, applicable statutes and previously controlling regulations, the rightful, vested owners of all excess surplus funds in the NHMMJUA that remain after court approval of Receiver's liquidation of the NHMMJUA, transferred its coverage-related obligations, payment of its administrative and operational expenses, transfer or resolution of tax obligations and payment of receivership expenses.

However, the New Hampshire Supreme Court has already decided that holders of JUA insurance contracts do in fact have a vested right in surplus funds held by the JUA. The real issue here is not a declaration of rights but a determination of what percentage of the funds should be distributed, what percentage should be retained and to whom the funds should be disbursed.

The Receiver has represented he believes that there are sufficient JUA funds to make a distribution of $50 million. Notably, the lead Plaintiffs do not challenged the Receiver's conclusion that $50 million should be distributed and that it is necessary that

$36 million be retained by the JUA to ensure the continued operation of the JUA.

In the Renewed Motion, Plaintiffs asserted that they had resolved the issues raised by the Court in the February 2016 dismissal without prejudice of their previously filed First Amended Complaint. First, they asserted that no conflict among class members existed and that no subclasses would be necessary. (Memorandum in Support of Lead Plaintiffs Renewed Motion for Preliminary Class Certification, Appointment of Class Counsel and Approval of Notice, p. 10. (Hereafter "Memo in Support of Renewed Motion.")) Second, they pointed out that the Receiver has now tendered $50 million to the Court, and the Court therefore has jurisdiction. (Id. at p. 7–8.) Finally, they argued that this case could be treated as a limited fund settlement pursuant to Fed. R. Civ. P. 23(b)(1)(B). (Id. at 12–13.)

Plaintiffs recite that "the Receiver's Interpleader and Lead Plaintiff's Response address [the Court's concern's about proceeding *in rem* and whether a valid interpleader has occurred] by way of the Receiver's nominal appearance as the interpleader of the funds and his tender of $50 million to the jurisdiction of this Court." (Memo in Support of Renewed Motion, p. 8.). However, the Court does not believe a valid interpleader action has been brought by the Receiver.

Interpleader is an equitable remedy by which a party who asserts that he is ignorant of the rights of different claimants or at least that there is doubt as to which of them is entitled to a fund, may pay the money into court so that the claims may be resolved and, implicitly, avoid any further liability to him. Page Belting Co. v. F.H. Prince & Co., 74 N.H. 262, 263 (1907). There is little modern law regarding interpleader

in New Hampshire,[3] and no explicit rule such as Fed. R. Civ. P. 22. Parties nonetheless occasionally interplead funds in New Hampshire,[4] and the Legislature has ordered that funds should be interpleaded into this Court so that claims can be resolved. The Plaintiffs have not been able to provide the Court with any case in which a Court has approved the class action mechanism in order to resolve competing claims to funds after interpleader.

Interpleader requires the interpleading party to join all the parties it believes claim against it. See, e.g. Fed. R. Civ. P. 22(1). Under common-law interpleader, a party seeking to interplead must bring a Petition which:

> . . . must set forth the names and addresses of the stakeholder and the claimants, state the facts on which their respective interests are founded, show how their claims are in conflict with each other, and allege that the claimants each demand the right of possession. The pleading must show, by allegations of fact that there is a reasonable basis for being unable to determine the merits of the claimant's title, that there is no means at law to obtain a determination of the issue and that there is a danger of loss without court intervention.

G. MacDonald, Wiebusch on New Hampshire Civil Practice and Procedure, § 37.05 (3rd Ed. 2010) p. 37-4; see also Fed. R. Civ. P. 22.

Plainly, the Receiver has not complied with the common-law requisites for a bill of interpleader. The bare bones pleading called " Bill of Interpleader" prepared by the Receiver, names no Defendants, and simply seeks as relief that the Court grant the interpleader and accept jurisdiction and control over $50 million in his possession pursuant to RSA 404-C: 17. The common law of interpleader contemplates that a party

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[3] It is true that several statutes reference the concept of interpleader but there is no interpleader statute or Rule.

[4] It appears to the Court that the disuse to which interpleader has fallen may well be due the fact that in cases which would otherwise call for interpleader, defendants prefer to bring petitions for declaratory judgment to ensure that they can join all of the potential claimants. See, e.g. Ellis v. Royal Ins. Co., 129 N.H. 326, 328 (1987).

seeking to resolve competing claims must serve the potential claimants with orders of notice. G. MacDonald, Wiebusch on New Hampshire Civil Practice and Procedure, § 37.05 (3rd Ed. 2010) p. 37-4. The point of the procedure appears to be to ensure that the party submitting funds is not subject to multiple liabilities and insuring that there is an equitable distribution of available funds. Wright and Miller, 7A Federal Practice and Procedure Civ. § 1714 (2017). Under common-law precedent, a "nominal appearance as interpleader of the funds" would be insufficient to invoke the interpleader jurisdiction of the court. Parker v. Barker, 42 N.H. 78, 96 (1860). Moreover, here the Receiver apparently is in in possession of $86 million in surplus funds but only seeks to distribute $50 million in surplus funds. RSA 404-C-17, III seems to require transfer of all assets to the Court with the purpose of adjudicating the rights of the parties.

While traditional interpleader appears to afford the Plaintiffs and the putative class similar relief, the class action mechanism is more appropriate to resolve this dispute. Class actions, like interpleader, themselves have their genesis in equity and actions akin to class actions appear to have been recognized at common law in New Hampshire. Smith v. Bank of England, 69 N.H. 254 (1898). Treating all plainitiffs as members of a class is logical and reasonable. There is a limited fund of money available to former policyholders of the JUA and there are more than six thousand claimants. Those claims are essentially contractual in nature and should be subject to adjudication pursuant to fixed and definite metrics. It is critical that the Receiver be protected from a contract liability which could impair the operation of the JUA if 100% of the surplus were paid out. Resolution through a procedure which provides notice to all interested parties and gives them the opportunity to object to the method of allocation would

satisfy due process and would be consistent with principles of aggregate adjudication. See generally Principles of the Law: Aggregate Litigation, § 1.02 (ALI 2009). Moreover, if this matter proceeds as a class action, the Court may appoint class counsel who will ensure that the limited fund is distributed equitably among all of the claimants rather than solely to the early claimants. Rubenstein, 2 Newberg on Class Actions, § 4.16 (5th Ed. 2016). Counsel have not even addressed the issue of the Court's authority to appoint counsel to represent the interests of over 6000 litigants with adverse interests to interpleaded funds, and the Court is unaware of any authority for such a proposition. See id.

The Plaintiffs suggest that this case could proceed as a limited fund class action, pursuant to Fed. R. Civ. P. 23(b)(1)(B):

> Moreover, as the Court observed at the October 5, 2015 status conference, the circumstances in this case are closely analogous to those contemplated by Fed. R. Civ. P. 23 (b)(1)(B) supporting importation of its principles. Under Rule 23 (b)(1)(B), where, as here, the prosecution of separate actions by individual members of the class would create the risk (indeed the virtual certainty) of adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests, the court may certify the case as a mandatory class proceeding against a limited fund.

(Memo in Support of Renewed Motion, p. 12.)

The United States Supreme Court has noted that among the traditional varieties of representative suits encompassed by Fed. R. Civ. P. 23(b)(1)(B) are those involving the presence of property which calls for distribution or management. Otiz v. Fibreboard Corporation, 527 U.S. 815, 834 (1999). Courts have been willing to take jurisdiction over funds such as trust assets, bank accounts, insurance proceeds, and company assets in a liquidation sale in order to ensure that claims are distributed in a proportional way to

each class member's percentage of substantiating claims. Id. See Rubenstein, 2 Newberg on Class Actions, § 4.16 (5th Ed 2016).

Such an approach seems appropriate in this case, since excess disbursement of funds might lead to injury to prospective class member policyholders through an inadequacy of reserves for future operations of the JUA. It is conceivable that litigation by policyholders on a breach of contract basis could result in different determinations regarding the amount of funds to be withheld. A policyholder who makes a breach of contract claim against the Receiver can assert a contractual right to 100% of the current surplus of the JUA, seeking distribution though a breach of contract claim of his or her percentage of $86 million rather than of the $50 million the Receiver believes can be appropriately disbursed. This could conceivably render the JUA insolvent in the future, and limit the ability of other policyholders to recover. The principle behind a limited fund settlement is the potential for insufficiency of assets to satisfy all claims, which justifies "the limit on an early feast to avoid a later famine". Ortiz v. Fibreboard., 527 U.S. at 837. To effectuate the purpose of a limited fund settlement, such settlements are mandatory. Rubenstein, 2 Newberg on Class Actions, § 4.18 (5th Ed 2016):(" To achieve this goal, Rule 23 (b) (1) (B) suits are generally mandatory- that is, class members may not opt out").

But the Court has several concerns. First, RSA 404-C:17 seems to require that the action proceed by interpleader: "if any class of JUA policyholders cannot be represented or is barred from the old action, a new interpleader action shall be commenced to allow such policyholders to assert their claims with respect to funds". RSA 404-C: 17, III. Presumably this issue could be resolved by some procedural mechanism to provide

notice to absent class members in a way which avoids the expense of formal service of process. But more importantly, Superior Court Rule 16, which governs class actions in State Court, does not have an analogue to Fed. R. Civ. P. 23(b)(1)(B). The current Superior Court Rule appears to have its genesis in the version of Fed. R. Civ. P. 23 current in the early 1980s.[5] The New Hampshire Supreme Court has instructed trial courts to be guided by the provisions of Fed. R. Civ. P. 23. In re Bayview Crematory, LLC, 155 N.H. 71, 74 (2007). However, the Court cannot be guided by a Rule which was never enacted by the New Hampshire Supreme Court as part of the Superior Court Rules. This is particularly so with respect to any proposed limited fund settlement, which in order to effect its purposes, must be a mandatory settlement and therby cuts off substantive rights. The United States Supreme Court has cautioned against "adventurous application of Rule 23 (B)(1)(B)", emphasizing that a "limiting construction" that "stays close to the historical model... avoids serious constitutional concerns raised by the mandatory class resolution of individual legal claims". Ortiz v. Fibreboard, 527 U.S. 845; see also Rubenstein, 2 Newberg on Class Actions, § 4.18 (5th Ed 2016).

RSA 490:4 provides that the New Hampshire Supreme Court is to exercise general superintendence of all courts of inferior jurisdiction to prevent errors and abuses. That authority has led the New Hampshire Supreme Court to state that it has power to "issue whatever process is necessary for the furtherance of justice", that its obligation is to allow "such procedure as justice and convenience require" and that the

[5] It is perhaps not surprising that the class action rule has not been amended since class actions in Superior Court are relatively rare in light of the provisions of 28 U.S.C. §1332(d), the Class Action Fairness Act.

writs and processes the Court is authorized to issue "will include the best that can be invented" to provide litigants with a remedy. Boody v. Watson, 64 N.H. 162, 169-172 (1887). A lower court does not have such authority.

In the circumstances of this case, where the need for a remedy is apparent, the procedure to be applied unclear, and the amount of money at stake, $86 million, is significant, the Court believes that the New Hampshire Supreme Court should determine what procedure should be applied to adjudicate the competing claims of the policyholders in this matter. Accordingly, the Court orders that counsel for the Plaintiffs shall prepare an Interlocutory Transfer of Ruling pursuant to New Hampshire Supreme Court Rule 9 to the New Hampshire Supreme Court containing at least the questions of:

(1) Whether, in the circumstances of this case, the Plaintiffs may bring a limited fund class action against the funds the Insurance Commissioner seeks to tender to this Court in accordance with RSA 404-C: 17, III, in a manner akin to Fed. R. Civ. P. 23 (b)(1)(B) pursuant to Superior Court Rule 16; and

(2) If such an action may be maintained, what procedure should be utilized by this Court to ensure fair adjudication of the claims of identified claimants.

SO ORDERED

5/2/17
DATE

Richard B. McNamara,
Presiding Justice

4831-6170-9385.6

EXHIBIT 3

The State of New Hampshire

MERRIMACK, SS SUPERIOR COURT

Georgia A. Tuttle, M.D., LRG Healthcare and Derry Medical Center

v.

New Hampshire Medical Malpractice Joint Underwriting Association

No. 2010-CV-00414; 00294

And

In the Matter of the Winding Down of the New Hampshire Medical Malpractice Joint Underwriting Association

No. 2015-CV-00347

ORDER

Plaintiffs have filed a Motion to Reconsider this Court's Order of May 2, 2017, denying Plaintiff's Renewed Motion for Preliminary Class Certification, Appointment of Class Counsel and Approval of Notice. For the reasons stated in this Order, the Motion is DENIED.

Plaintiffs make four arguments. Plaintiffs first argue that allowing a class action to be brought against funds the Insurance Commissioner offers to pay into the Court is proper because the Court has done so previously. They argue that this Court's Order of October 9, 2012, in Tuttle, et al v. New Hampshire Medical Malpractice Joint Underwriting Association, No. 2010-CV-00414, approving the Proposed Plan of

Allocation, Case Contribution Award for Certain Class Members, and Class Counsel's Fees and Costs constituted a "combined interpleader and class action." However, the record demonstrates that Tuttle was a not an interpleader action, but was an action for breach of contract. No interpleader action was ever brought by the Insurance Commissioner. No funds were paid into the Court by the Insurance Commissioner. The Insurance Commissioner never brought suit against any claimants. The Court's Order of October 9, 2012 sets out the procedural posture of the case and explained that class certification and summary judgment were granted on the Plaintiffs' breach of contract claim:

> In August 2011, Plaintiffs filed a motion for certification of a settlement class. However, at a hearing on preliminary approval, the parties advised the Court that no settlement existed and asked the Court to certify the Class as a liability class. The Court denied the motion without prejudice, and Plaintiffs filed a supplemental motion. The supplemental motion moved to certify a class consisting of all JUA policyholders who purchased assessable and participating insurance contracts, issued on or after January 1, 1986 through the date of the final fairness hearing ("class period"). The Class Members would be the named insureds who purchased a policy, as reflected in the JUA books and records.
>
> Plaintiffs sought certification only on their contract claim against the trustees. A breach of contract claim is a relatively straightforward matter. Unlike a tort claim, there is no requirement of individual proof of damages because damages are not an element of a breach of contract claim. See RESTATEMENT (SECOND) CONTRACTS § 347(2). Plaintiffs allege that all parties had the same—or substantially identical—insurance contracts with the same provisions, which remained unchanged in all material respects during the class period. Thus, the Court found that the proposed class appeared to meet the requirements of numerosity, commonality, typicality, adequacy, and predominance, and the Court preliminarily approved the Class on February 7, 2012 and ordered that notice be sent to the putative Class Members. 1 NEWBERG § 3:18; see Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 40 (1st Cir. 2003) (affirming predominance where one claim alleged breach of contract); Oscar v. BMW of North Am., LLC, 274 F.R.D. 498, 506–07 (S.D.N.Y. 2011) (finding commonality fulfilled where one claim alleged breach of contract).
>
> However, at oral argument on final certification the parties asked the Court to construe their cause of action as a contractual-right theory, without a breach. The JUA continued to deny any wrongdoing, but it did not dispute the Class's contractual rights. Despite this modified theory of recovery, Plaintiffs

> fulfilled their burden of proving that the Class Members share a question of law in common. This Court granted final certification on June 15, 2012. Following certification, Class Counsel had already moved for summary judgment on the contractual right theory on May 1, 2012, the JUA responded on June 1, 2012, and this Court granted the Motion for Summary Judgment on June 27, 2012. Since liability had already been established by granting summary judgment, the only issue remaining is the appropriate distribution of the common fund.

Order, Tuttle, et al v. New Hampshire Medical Malpractice Joint Underwriting Association, No. 2010-CV-00414, October 9, 2012, p. 3–4.

In fact, in its Motion to Approve the Plan of Allocation, Case Contribution Award, and Class Counsel's Fees and Costs, then class counsel, (counsel here) expressly recognized that they were bringing a breach of contract action against the Insurance Commissioner:

> The Insurance Commissioner, who continued to contend the surplus funds belonged to the State, refused to allow the NHMMJUA distribute these funds. Nixon Peabody brought a putative class action against the NHMMJUA and its Board of Directors for *breach of fiduciary duty, breach of contract and breach of the covenant of good faith and fair dealing* concerning the excess premiums belonging to all policyholders. (Emphasis supplied.)

(Mot. to Approve the Plan of Allocation, Case Contribution Award, and Class Counsel's Fees and Costs, p. 7.) Therefore, the argument that an interpleader already occurred in the previous case fails.

Second, Plaintiffs argue that the Court erred by stating that there is no authority for the proposition that a class action can be brought against interpleaded funds, citing Republic of the Philippines v. Marina Pimental et al., 533 U.S. 851 (2007) and Lorillard Tobacco Co., et al. v. Chester Wilcox & Saxbe et al., 546 F.3d 752 (6th Cir. 2008). But both cases are inapposite. Republic of the Philippines is a run-of-the-mill interpleader action, in which one of the claimants happened to be a class which had obtained a judgment against

the former President of the Philippines, Ferdinand Marcos. The class sought to attach the assets of a company incorporated by Marcos held by a New York broker. Facing claims from various creditors, including the class, the broker interpleaded the funds under 28 U.S.C. § 1335, and named the class as one of the defendants.

Similarly, Lorillard Tobacco is not an action brought by members of a class against a fund, but is rather an atypical interpleader action in which the interpleading party sought to impose the class action structure on a group of attorneys seeking to recover attorney's fees from a common fund after a class action. Lorillard Tobacco, 546 F.3d at 755. Class actions brought by defendant are rare and not favored. In bringing such an action:

> [T]he plaintiff collectivizes her adversaries, selects a representative for them, and, assuming that she can secure court certification of the class, then imposes on that representative the obligation of litigating on behalf of a class of absent defendants. The representative defendant's attorney is unlikely to get a special fee for representing the class, will not organize a legal practice around such representation, and the whole scheme has but a marginal impact on the enforcement of substantive legal norms.

Rubenstein, 2 Newberg on Class Actions, § 5.1 (5th Ed. 2016) pp. 399–400. Here, of course, there is no defendant who seeks to create a class; the only litigants are the Plaintiffs.

Third, Plaintiffs argue that the Legislature has determined how the proceeds in this case should be distributed:

> Undersigned counsel was closely involved with the Legislature's consideration, drafting and passing of RSA 404-C:17. This statute was intentionally modeled its highly successful predecessor of RSA 404-C:14 to ensure uniform treatment of the class of policyholders to whom these excess surplus funds belong. The statute was careful to specify that the excess surplus funds would be interpleaded, just like the predecessor statute required. *It also specified that the funds would be interpleaded into this prior docket to ensure the rulings of law established in the prior proceedings would predictably and fairly govern the final distribution.* (Emphasis

supplied.)

(Lead Pl.'s Mot. to Reconsider, p. 5–6.)

Part I, Article 37 of the New Hampshire Constitution specifically provides that the powers of the three branches of government must be separate. The principle of separation of powers in New Hampshire is not a description of the operation of the Constitution, but an explicit right. Ashuelot Railroad v. Elliot, 58 N.H. 451, 452 (1878). The Legislature has no authority to determine the amount of funds to be awarded to individuals with contract rights against another. A statute cannot be interpreted in a way which would render it unconstitutional, and therefore the Court cannot accept Plaintiffs' construction of RSA 404-C: 17. See, e.g. Clark v. Martinez, 543 U.S. 371, 382 (2005).

Finally, the Court does not have plenary authority to adjudicate the rights of parties not before it, merely because Superior Court Rule 16(h) contains language allowing the Court to make payment to class members in circumstances it deems appropriate. The Court's discretion must be bounded by law. Indeed, this argument casts in bold relief the difficulty which arises in this case; the Insurance Commissioner is holding $86 million in surplus funds. The New Hampshire Supreme Court has determined that these funds belong to policyholders. The Insurance Commissioner seeks to distribute only $50 million of the funds, retaining $36 million to ensure that the JUA can continue to operate. No policyholder has sued the Insurance Commissioner, as any policyholder could, to obtain 100% of the $86 million. It is not clear on this record that all current and former policyholders have the same interest in ensuring that the JUA continues to function.

Class actions have two primary goals: to provide efficiency in litigation and to provide procedural protections to protect the interests of absent class members.

Rubenstein, 2 Newberg on Class Actions, § 1:10 (5th Ed. 2016). The procedure proposed by Plaintiffs does not fully address the procedural protections necessary to protect all absent class members and is not authorized by Superior Court Rule 16. Therefore the Motion to Reconsider must be DENIED.

SO ORDERED

5/17/17
DATE

Richard B. McNamara
Richard B. McNamara,
Presiding Justice

RBM/

4831-6170-9385.6

EXHIBIT 4

Revised Statutes Annotated of the State of New Hampshire
Title XXXVII. Insurance (Ch. 400 to 420-N) (Refs & Annos)
Chapter 404-C. Mandatory Risk Sharing Plans (Refs & Annos)

This section has been updated. Click here for the updated version.

N.H. Rev. Stat. § 404-C:14

404-C:14 New Hampshire Medical Malpractice Joint Underwriting Association (NHMMJUA).

Effective: December 31, 2011 to July 31, 2014

I. Notwithstanding any provision of law to the contrary, no officer or agent of the state shall take or transfer, through taxation of the New Hampshire Medical Malpractice Joint Underwriting Association (NHMMJUA) or otherwise, any funds held by the NHMMJUA on the effective date of this section in a manner inconsistent with this section. Nothing in this section shall preclude the collection of applicable state taxes, if any, owed by policyholders as a result of the return of funds referenced in this section.

II. All funds held as of the effective date of this section by the NHMMJUA in excess of the amount required for the fund to remain actuarially sound, as determined by a qualified actuary, shall constitute excess surplus funds and shall not be less than $110,000,000 in accordance with 2009, 144:1. Such determination shall be completed under the direction of the NHMMJUA board of directors not more than 45 days from the effective date of this section. All such excess surplus funds have resulted from premiums paid under assessable and participating medical malpractice insurance policies, belong to the policyholders who paid these premiums, and shall be returned as directed under this section. Within 60 days from the effective date of this section, all excess surplus funds, except for a reserve of $25,000,000 for the payment of any federal tax liability, shall be interpleaded into the Merrimack County Superior Court, docket no. 217-2010-CV-00414 for the purpose of adjudicating all policyholders' claims to excess surplus funds. All distributions made to policyholders shall be subject to a claim from the NHMMJUA to reclaim a pro rata portion of the distribution to satisfy any federal tax liabilities in excess of the $25,000,000 reserved for such claims.

Notwithstanding any other provision of law to the contrary, in no event shall any insurer which is a member of the NHMMJUA, as defined in Ins 1703.01(i), be assessed nor shall there be a surcharge, as provided in Ins 1703.07(f)(2), with respect to any deficit arising from the distribution of excess surplus funds described in this paragraph.

III. Within 30 days of the effective date of this section, the NHMMJUA, the insurance commissioner, or designee, and a representative of NHMMJUA policyholders, designated by the president of the New Hampshire Medical Society, shall jointly approach the United States Internal Revenue Service to obtain a closing agreement, or its equivalent, determining whether the NHMMJUA has any federal tax liability arising from the excess premiums paid and that shall be returned to policyholders.

IV. No later than 30 days after receipt of the closing agreement, or its equivalent, the NHMMJUA shall interplead into the Merrimack County Superior Court docket no. 217-2010-CV-00414 for the purpose of adjudicating all policyholders' claims to these remaining excess surplus funds the remaining amount of the tax reserve after satisfaction of any taxes owed.

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V. Funds that cannot be distributed to a policyholder in the court proceedings referenced in this section due to the inability to locate the policyholder after reasonable efforts, shall revert to the NHMMJUA. Undistributed funds that revert to the NHMMJUA as provided in this section shall be used to provide grants in aid to health care providers servicing medically underserved populations to assist in the NHMMJUA coverage.

VI. The approval of the commissioner of insurance shall not be required for any action contemplated under this section.

VII. [Repealed.]

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N.H. Rev. Stat. § 404-C:14, NH ST § 404-C:14
Updated with laws current through Chapter 53 of the 2017 Reg. Sess., not including changes and corrections made by the State of New Hampshire, Office of Legislative Services

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